

SKIP DUROCHER
(612) 340-7855
FAX (612) 340-2807
DUROCHER.SKIP@DORSEY.COM

May 16, 2013

President Warren C. Swartz, Jr.
Keweenaw Bay Indian Community
16429 Beartown Rd.
Baraga, MI 49908

Re: Application of Keweenaw Bay Indian Community for Treatment as a State Under
the Clean Water Act

Dear President Swartz:

As requested, we have prepared a brief statement describing the basis for the assertion of authority by the Keweenaw Bay Indian Community to regulate activity occurring on lands within the L'Anse Indian Reservation and Marquette trust lands (collectively, the "Reservation") that affects surface water quality within those territorial boundaries. As you are aware, KBIC is applying for treatment as a state ("TAS") status from the Environmental Protection Agency ("EPA") under § 518(e) of the Clean Water Act, 33 U.S.C. § 1377(e). To secure TAS status, the EPA requires Indian tribes to submit a statement describing the legal basis for asserting regulatory authority over water quality. 40 C.F.R. § 131.8(b)(3)(ii) (2012). This letter constitutes that statement for KBIC.

I. Requirements for Treatment as a State Under the Clean Water Act.

The Clean Water Act allows states to adopt water quality standards. 33 U.S.C. § 1313. Water quality standards supplement other water pollution limitations so that discrete sources of pollution, despite individually complying with effluent limitations, do not collectively cause water quality to fall below acceptable levels. Env'tl. Protection Agency v. California ex rel. State Water Res. Control Bd., 426 U.S. 200, 205 n.12 (1976). States enforce their water quality standards by issuing certificates of compliance for new federally-issued permits or by directly issuing their own permits, with federal supervision. 33 U.S.C. §§ 1341, 1342. In 1987, Congress added § 518(e) to the Clean Water Act. Section 518(e), now codified at 33 U.S.C. § 1377(e), authorizes Indian tribes to be treated as states for certain purposes, including for purposes of water quality standards programs and certificate of compliance programs. 33 U.S.C. § 1377(e). Section 518(e) provides that TAS status may be afforded to an Indian tribe if:

- (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
- (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by

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an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and

(3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

Id.

In addition, the regulations promulgated by the EPA require that Indian tribes submit with their applications for TAS status the following information: (1) a statement that the tribe is recognized by the Secretary of the Interior, (2) a descriptive statement demonstrating the tribe is carrying out substantial governmental duties and powers over a defined area, (3) a descriptive statement of the tribe's authority to regulate water quality, and (4) a narrative statement describing the tribe's capability to administer an effective water quality standards program. 40 C.F.R. § 131.8(b). It is counsel's understanding that KBIC has already provided information to the EPA satisfying criteria (1), (2), and (4). With respect to criterion (3), the EPA regulations call for: (i) a map or legal description of the area over which the tribe seeks to regulate surface water quality, (ii) a statement by counsel describing the legal basis for the tribe's assertion of such authority, and (iii) an identification of the surface water for which the tribe intends to establish water quality standards. 40 C.F.R. § 131.8(b)(3). It is counsel's understanding that information satisfying criteria (i) and (iii) have already been provided to the EPA and that KBIC intends to exercise regulatory authority over all surface water quality within the territorial boundaries of the Reservation. Therefore, the scope of this letter is limited entirely to describing the legal basis for KBIC's assertion of such regulatory authority.

II. KBIC Has Inherent Authority to Regulate Water Quality Within Its Reservation.

A. General Principles of Inherent Authority of Indian Tribes.

The sovereignty of federally-recognized Indian tribes, such as KBIC, is well-established and beyond question. Incident to that sovereignty, Indian tribes retain certain inherent powers. See, e.g., United States v. Wheeler, 435 U.S. 313, 322-26 (1978) (holding Navajo Nation possessed inherent power to prosecute members for tribal offenses). Those inherent powers include the power to regulate activity on tribal trust lands, even the activity of non-Indians. See Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 201 (1985) ("The power to tax members and non-Indians alike is surely an essential attribute of [] self-government . . ."). Those inherent powers also extend to tribal members, whether on fee or trust land, within the tribe's reservation. See United States v. Kagama, 118 U.S. 375, 381-82 (1886) (noting Indian tribes have the "power of regulating their internal and social relations"); see also John v. Baker, 982 P.2d 738, 749-52 (Alaska 1999) (holding inherent sovereignty of tribe extended jurisdiction

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of tribal court to child custody dispute involving tribal member, even with no on-reservation conduct).

The inherent authority of Indian tribes also includes the authority to regulate the activity of non-Indians on fee land within a tribe's reservation, subject to certain limitations and qualifications. In United States v. Montana, the U.S. Supreme Court recognized that an Indian tribe possesses inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on fee land owned by non-Indians within that tribe's reservation. 450 U.S. 544, 565 (1981). The Court went on to say that such jurisdiction is appropriate only when (1) non-Indians have entered into consensual commercial dealings with a tribe or its members or (2) conduct of non-Indians on fee lands within a reservation threatens or has some direct effect on "the political integrity, the economic security, or the health or welfare of the tribe." Id. at 565-66. Later, in Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, in a four-justice plurality opinion, Justice White stated that such conduct must have an impact that is "demonstrably serious." 492 U.S. 408, 431 (1989). Therefore, after Montana and Brendale, it is clear that an Indian tribe has inherent authority to regulate some conduct that threatens or directly effects the political integrity, economic security, or health or welfare of the tribe, but the precise magnitude of such a threat or effect, whether it must be demonstrably serious or not, is unclear.

With respect to TAS status under the Clean Water Act, the EPA has stated it will follow the Montana and Brendale frameworks in evaluating an Indian tribe's authority over non-Indians. 56 Fed. Reg. 64,876, 64,880 (Dec. 12, 1991). However, in light of the unique and critical nature of water, the EPA has made a generalized finding that Indian tribes are likely to possess sufficient inherent authority over non-member activities to control reservation environmental quality, and therefore it is unnecessary to develop an extensive and detailed factual record in each TAS case. Id. at 64,878-79. In particular, the EPA has noted the mobile nature of pollutants in surface waters and the resulting practical difficulty in separating the effects on water quality of conduct on non-Indian fee land and land owned by tribes or tribal members. Id. As a result, TAS status is, according to the EPA, "a relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members, . . . and that the waters and critical habitat are subject to protection under the Clean Water Act. The Tribe must also explicitly assert that impairment of such waters by the activities of non-Indians, would have a serious and substantial effect on the health and welfare of the Tribe." Id. at 64,879. Once the tribe makes its initial showing, the EPA will presume there has been an adequate showing of tribal jurisdiction over fee lands. Id. However, the TAS status analysis is always case-by-case, depending on the specific circumstances facing a particular tribe. Id. at 64,878.

B. KBIC Has Inherent Authority to Regulate Water Quality on the Reservation.

The L'Anse Indian Reservation boundaries encompass about 59,000 acres of land, of which approximately 66% is owned privately in fee by entities that are not KBIC members, such

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as individuals, municipalities, the State of Michigan, or non-tribal corporations. App'x N.¹ This exact figure is constantly shifting as KBIC has a land re-acquisition program. The authority of KBIC to regulate activity on its own land and the land of its members within its Reservation is "at its zenith" and is plenary. Cohen's Handbook of Federal Indian Law §§ 4.01[1][b], 6.02[1] (Nell Jessup Newton, et al., eds. 2012). Furthermore, under Montana and Brendale, KBIC can directly regulate non-Indian activity on the Reservation affecting water quality within the Reservation. As required by the Brendale plurality, the threat posed by such activity to the political integrity, economic security, and health and welfare of KBIC is demonstrably serious. As will be discussed below, the threat is demonstrably serious in part due to the nature of the subject to be regulated – water. Water is of the utmost importance, it is the essence of all life on this planet. Water further holds particular cultural significance to KBIC and its members. Moreover, water's fluid and permeable nature make a threat to water in a single area a threat to an entire water system.

1. Significance of Water to KBIC.

As suggested by KBIC's unabbreviated name—the Keweenaw Bay Indian Community, Lake Superior Band of Chippewa Indians—the Tribe's primary territory, the L'Anse Indian Reservation, sits on the shores of Lake Superior along a recess known as Keweenaw Bay. App'x B. The municipalities of Baraga and L'Anse, which lie partially within the Reservation, sit along the shores of a smaller recess at the bottom of Keweenaw Bay known as L'Anse Bay. The Reservation is home to numerous rivers, streams, lakes, ponds, and wetlands. App'x P. All waters of the Reservation flow towards or into Lake Superior. Id. The upper portions of the watershed on the Reservation are characterized by high gradients with gorges, falls, and rapids. Id.

As would be expected for a people living in such close proximity to abundant sources of fresh water, fresh water and its attendant plant and animal resources have been and continue to be integral to both the contemporary and traditional culture of KBIC. See generally App'x W. Fish traditionally have provided sustenance to KBIC and its members, a tradition which continues to this day. Id. For generations, continuing to the present, KBIC members have engaged in ice fishing in the winter and spear fishing in the spring. Application at 20. They also fish the inland lakes, rivers and streams year-round. See id. at 20-21. A cultural delicacy, fish from local waterways continue to be a "major component" in the diet of contemporary KBIC tribal members. Id. at 40. Fish are of such cultural importance to KBIC that they are the focal point of several community events. Each year the tribe hosts, with a significant investment in stocking waters with fish, an event known as the KBIC Kids' Fishing Derby in which the

¹ Citations to "App'x ____" refer to the numbered appendices submitted to the EPA by KBIC with its "Application for Programmatic Approval under Section 303 of the Clean Water Act." Many of these appendices are multiple documents or partial documents, without uniform page numbering, and therefore pincites have generally not been provided. Wherever practicable, however, pincites are included. Citations to the "Application for Programmatic Approval under Section 303 of the Clean Water Act" itself do include a pincite and are in the form of "Application at ____."

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community honors a former commercial fisherman or family and the fishing tradition of KBIC generally. Application at 18. KBIC also hosts an annual Lake Superior Day which celebrates the water with a feast, ceremony, and beach clean-up. Application at 28; App'x W. Beyond its cultural importance, fish confer important economic benefits to KBIC tribal members. Many tribal members engage in commercial fishing pursuant to tribal law and tradition. App'x W. Recognizing the importance of fish as sustenance, a cultural and community symbol, and an economic benefit to KBIC members, KBIC tribal government has invested some \$1.5 million in KBIC's fish hatcheries and walleye facilities that are used to stock fish in Lake Superior and in waters within the Reservation. Application at 22-23. In celebration of this tradition, the KBIC tribal government has erected a Fisherman's Memorial on Sand Point. Id. at 18

In addition to the importance of the fish within the waters of the Reservation, the plants within those waters are also integrally important to KBIC. Wild rice in particular has a revered place in KBIC culture. App'x S; App'x W. Wild rice is the cornerstone of KBIC's creation story. Application at 24. Over one thousand years ago, the ancestors of the contemporary KBIC were visited by eight Prophets and given seven Prophecies to follow, the third of which directed them to travel westward until they found the place where "food grows on water." Id. The Prophecy warned that if they did not travel, they would be destroyed. Id. When they arrived in the Great Lakes region and Upper Peninsula of Michigan, they discovered vast beds of wild rice. Id. While many historic wild rice stands were lost in the 18th and 19th centuries, recognizing the importance of wild rice to its cultural preservation, KBIC has worked to re-establish wild rice stands on the Reservation. App'x S. As a result, today wild rice grows within the lakes and ponds on the Reservation and continues to be harvested by KBIC tribal members for food and as a cultural celebration, as it has been for generations. App'x S; App'x W.

In addition to the plants and animals growing within Reservation waters themselves, plants and animals essential to the health and welfare of KBIC and its members also grow on the embankments of these Reservation waters. Unfortunately, many native plants have been lost to the area. However, in 2010 KBIC started a greenhouse program wherein indigenous plants are grown and then re-introduced to their natural wild habitat. Application at 23.

Among the animals indigenous to the area, the most important to the cultural and spiritual well-being of KBIC, and indeed selected as the symbol for KBIC itself, is the eagle. Eagle parts and feathers are essential to the religious and cultural practices of KBIC. Application at 20. Eagles are found on the Reservation, App'x W, and depend on high-quality water for survival. Other wildlife such as waterfowl and deer are critical to the traditional and contemporary culture of the KBIC. Hunting provides recreation and dietary sustenance for tribal members. See App'x W. More importantly, wildlife supported by Reservation waters provide cultural and community vitality. Community events such as the Pow-Wows and Fall Harvest Feast depend on game animals, and deer in particular. Application at 22. These animals in turn depend on high-quality water for their existence.

Likewise, Reservation waters support a variety of flora significant to KBIC and its members. The Tribe has a stake in on-Reservation commercial forestry that provides a

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significant economic benefit. Income generated by timber harvests has averaged \$85,861 per year. Application at 25. The shores of Reservation waters also support many berry bushes and maple trees that were traditionally harvested, and continue to be harvested, by KBIC members. App'x W. Further, plant species found by Reservation waters have been used and are used by practitioners of traditional medicine. Id.

Finally, the surface waters of the Reservation themselves are of vital importance to cultural practices of KBIC and its members. Each spring tribal members participate in the religious ceremony "The Breaking of the Water," in which they thank the Creator for water. App'x W. Furthermore, sweat lodges have traditionally been an important religious rite. See Application at 26. Today, sweat lodges and saunas are used by tribal members for both traditional and recreational purposes. Id. One important example is the use of the sweat lodge ceremonies by KBIC's New Day Treatment Facility, a substance abuse treatment center. Id. Both ground water and surface water are used to create water vapor and for ingestion in sweat lodges and saunas. Id. Additionally, tribal members, like members of surrounding communities and seasonal tourists, use the waters of the Reservation for recreational boating and swimming. App'x W.

In summary, the uses of surface waters within the Reservation by KBIC and its members are fundamental to their way of life, ranging from economic to recreational to spiritual. Unfortunately, the conduct and activities of non-Indians threatens water quality on the Reservation and, if left unregulated, would have a serious and substantial deleterious effect on the health and welfare of KBIC, its members, and would also negatively affect tribal culture and customs. Threats to water quality on the Reservation stem from a variety of sources.

2. Present and Potential Threats to Water Quality on the Reservation.

Water pollution from activity by non-Indians and non-KBIC members on fee land owned by non-Indians and non-KBIC members threatens water quality on the Reservation. These threats to water quality underscore the necessity of TAS status for KBIC. TAS status will allow KBIC to prevent further water quality degradation within the Reservation. TAS status will also allow KBIC to influence threats from outside the Reservation through the EPA and the Clean Water Act's dispute resolution procedures.

Erosion is a particular problem for Reservation waters. Trampling from cattle on non-Indian lands, deforestation from commercial logging from non-Indian businesses, sand and gravel mining by non-Indians, forestry roads, unpaved roads, and culverts from roads and development for non-Indians cause erosion, increased run-off, and obstruction of water flow. Application at 30-32, 39, 41-42. Run-off from road salt creates high chloride concentrations, negatively impacting amphibian species. App'x HH. Road run-off creates increased sediment in lakes and streams and obstruction of water flows which reduces and harms fish habitat.

Agricultural and silviculture practices also threaten Reservation water quality. High-density cattle operations have led to high bacteria levels in a Reservation creek. Application at

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30. Access of cattle to surface waters has resulted in sedimentation and the presence of animal waste in Reservation waters. Id. Over-fertilization and improper use of pesticides and herbicides has also contributed to water quality degradation. Id. Spreading of treated sewage on agricultural land has also spread heavy metals, excess nutrients, and bacteria into Reservation surface water. Id. In addition to pesticides and herbicides from agriculture, toxic herbicides and pesticides are also used in commercial silviculture and make their way into Reservation waters. Id. at 31. Silviculture operations also fill and dredge wetlands, disrupting flow of Reservation water systems. Id. Roads built by commercial silviculture have a particularly deleterious effect on water systems and dependent wildlife on the Reservation. Id. at 39.

Another particular problem is illegal dumping. The area around the Reservation has no convenient disposal sites for solid or hazardous wastes. App'x AA at 3. As a result, illegal dumping has been a problem on the Reservation for many years. In 2006, KBIC collected 241 tons of solid waste from seven illegal dumps across the Reservation. App'x AA at 15. Various volatile and semi-volatile chemicals and heavy metals are released into the environment as a result of illegal dumping. Application at 32-33. Through run-off or through ground water tributaries, these chemicals can and do reach the lakes, streams, and ponds of the Reservation. Household burn barrels, and the improper disposal of their ash, also introduce toxic chemicals into Reservation waters. Id. at 33.

Heavy metals and other hazardous or toxic substances are also discharged from former and current industrial sites. Unlicensed and licensed scrap yards or junk yards are found across the Reservation. One such scrap yard located on fee land and owned by a non-tribal member was found with refrigerators, gasoline tanks, vehicle batteries, large fluid containers, oil storage containers, automobile radiators, junk automobiles, electronic devices, air conditioners, tires, and vehicle batteries. App'x BB at 2. Leaking underground storage tanks have been found on the Reservation on properties owned by non-tribal members. App'x CC. EPA regulated sites and tribally-designated brownfields on and near the Reservation that are or were owned by non-tribal members attest to the environmental effects of former industrial sites in the area. See App'x DD; App'x FF. Toxins from these sites continue to threaten water quality. Additionally, "Michigan Part 201 Sites," i.e. areas with hazardous substances designated under certain Michigan law criteria, are present on or near the Reservation. App'x EE. In particular, located on the Reservation, there is a former plating facility and an active automotive repair and service station, both owned by non-members of KBIC. See id. Fifty-five-gallon waste drums have also been discovered dumped on tribal property. App'x GG. All these sites pose significant risks of contaminating Reservation waters with toxic or hazardous chemicals through run-off, ground water tributaries, or rain.

Ground water is also heavily affected by residential development and the use of septic systems. Many residences on the Reservation are not serviced by municipal wastewater collection and treatment systems because of the rural and isolated location of the Reservation. Application at 32. Therefore, these residences, both Indian and non-Indian, are forced to rely on septic systems. Id. Nutrients and bacteria from these septic systems can leach into the

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ground and surface waters. Id. Many KBIC members on the Reservation use groundwater as a source of drinking water, and any contamination of the groundwater imperils their health. Id. Contaminated surface water can cause disease in area wildlife and people that come into contact with or eat that wildlife. Id.

Residential development for non-Indians on and near the Reservation also poses a threat to Reservation water quality. Lawn chemicals enter Reservation waters. Id. The roads used for development introduce de-icing chemicals into water systems, App'x HH, which cause ice dams in drains and culverts. App'x Q. Wetland dredging and filling also occurs in development. App'x HH. Development also introduces non-native invasive species to the area. See App'x Q.

In addition to existing threats to water quality, a serious potential threat² bears mentioning. Several mineral exploration and mining companies are active in and around the L'Anse Reservation in an area known as the Baraga basin. App'x JJ. Two of these companies are known to have been exploring mining prospects within Reservation boundaries. Id. These companies are exploring possibilities for metallic sulfide mining or hardrock mining. Id. These types of mining present a serious risk of contamination of both ground and surface waters with toxic or hazardous materials. Id.

3. Threats to Water Quality Would Have a Serious and Substantial Effect on Health and Welfare of KBIC and Its Members.

The activities of non-Indians, discussed above, if unregulated, could deteriorate the water quality within the Reservation and have a serious and substantial effect on the health and welfare of KBIC and its members. Much of this activity threatens fish populations. For example, erosion and sedimentation destroy fish habitat. Chemical run-off poisons fish. Any threat to fish populations is a threat directly to the culture and economic well-being of KBIC. Without sufficient fish populations, KBIC culture cannot be meaningfully practiced. Traditional activities, such as fishing, hunting and gathering would be unavailable. The traditional diet would be compromised. The economic livelihood of tribal members engaged in commercial fishing would be endangered. The significant investment of KBIC in fisheries would be for nothing. Community events focused on fish and fishing would be hampered. Populations of culturally significant wildlife that depend on fish for food, such as the eagle, would be reduced or eliminated. Moreover, even surviving fish, if contaminated, would pose a direct health risk to KBIC members. As noted, fish are a traditional dietary staple for KBIC members. Reservation waters are already under fish consumption advisories for mercury. Application at 40. Any further contamination would exacerbate health risks for the KBIC population.

The health and welfare of KBIC and its members is dependent on water quality beyond fish. Wild rice, for instance, is sensitive to water levels and is disrupted by sedimentation. Id. at

² The Montana analysis applies to both threatened and direct effects. Montana, 450 U.S. at 566.

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24. In particular, KBIC has targeted lakes for wild rice restoration, but sedimentation caused by roads and former railways threatens the potential for restoration. See id. at 18. Likewise, contamination in water can spread to berries and other plants along embankments and to wildlife. In the extreme, water contamination can even poison wildlife and plants. Without wild rice and other plants and animals dependent on high-quality water, KBIC members cannot eat a traditional diet, cannot meaningfully participate in traditional community events that require deer meat or wild rice or berries, cannot exploit the commercial value of these plants, and cannot practice traditional medicine. If water is contaminated with heavy metals or other chemicals, KBIC members' health is endangered as they engage in recreational boating or swimming near their own homes. Even more troubling, their health is endangered as they breathe water vapor in practicing the cultural and spiritual rite of the sweat lodge. Therefore, conduct of non-Indians within the Reservation, if left unregulated, would be a serious and substantial effect on the health and welfare of KBIC members. Accordingly, KBIC has inherent authority to regulate water quality within the borders of the Reservation whether analyzed under Montana, Brendale, or the EPA's regulations.

4. Similar Cases Confirm TAS Treatment Appropriate.

Various cases confirm the conclusion that TAS status is appropriate for KBIC. KBIC is a tribe within a larger ethnic group known alternatively as the Ojibwa or Chippewa. Each name has several alternative spellings—Ojibwe or Chippeway, for example. In deference to the name used by KBIC in their application, we will refer to this ethnic group as the Ojibwa. Several courts in several different contexts have noted the importance of fishing, wild rice harvesting, and game hunting to the Ojibwa. See, e.g., Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 492 (7th Cir. 1993) (noting that fishing, wild rice harvesting, hunting, and gathering maple sap are traditional activities of the Chippewa with religious as well as economic significance); Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784, 791 (D. Minn. 1994) ("The Chippewa also used fish and game in spiritual ceremonies. For example, fresh fish are still necessary for funerals and burials."); Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, 781 F. Supp. 1385, 1389 (W.D. Wis. 1992) ("The significance of fishing for the Chippewa is religious and cultural as well as economic."); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin, 653 F. Supp. 1420, 1424 (W.D. Wis. 1987) (noting traditional importance of fishing, harvesting of wild rice, and hunting to Lake Superior Chippewa tribes in Wisconsin at time of treaties).

Most relevant here, the Seventh Circuit addressed the propriety of affording another Ojibwa tribe TAS status under the Clean Water Act in Wisconsin v. Env'tl. Protection Agency, 266 F.3d 741 (7th Cir. 2001). That case dealt with the TAS application of the Sokaogon Chippewa Community, also known as the Mole Lake Band of Lake Superior Chippewa Indians (the "Mole Lake Band"). Wisconsin, 266 F.3d at 745. That tribe is located in northeastern Wisconsin, id., relatively close geographically to the upper peninsula of Michigan where KBIC is located. In that case, the Seventh Circuit noted the tribe's reliance on water resources within its reservation for food, fresh water, medicines, and raw materials. Id. The court noted the particular importance of one lake as a source of wild rice. Id. Ultimately, the Seventh Circuit

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upheld the EPA's decision to grant the tribe TAS status. *Id.* at 750. KBIC is ethnically, culturally, and geographically related to the Mole Lake Band. Both tribes rely on reservation water sources for similar resources, and both place a high cultural and economic value on the plants and animals supported by fresh water. Just as TAS status was appropriate for the Mole Lake Band, TAS status is likewise appropriate for KBIC.

III. KBIC Has Delegated Authority From Congress to Regulate Water Quality.

While it is clear that KBIC has inherent authority to regulate surface water quality within its own Reservation, another basis for authority exists – delegated authority. The U.S. Supreme Court has long recognized that Congress may delegate its own authority to Indian tribes where those tribes have independent authority over the subject matter of the delegation. United States v. Mazurie, 419 U.S. 544, 556-57 (1975). Montana reaffirmed this principle. 450 U.S. at 564 (“But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.”). With respect to the Clean Water Act in particular, Justice White, writing for a plurality of the Court, presumed that the Clean Water Act was such a delegation in Brendale. 492 U.S. at 428 (citing 33 U.S.C. § 1377(e) as example of congressional delegation of authority to tribes). Because Brendale was not a majority decision, the EPA has decided to adopt the Montana framework rather than endorsing delegation. 56 Fed. Reg. at 64,879-80. However, notwithstanding the EPA's stance on the issue, it is counsel's opinion that delegated authority exists. In addition to the long-recognized ability of Congress to delegate and in addition Justice White's presumption that delegation occurred, delegation has been found in an analogous statute – the Clean Air Act. Az. Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1290-91 (D.C. Cir. 2000) (holding Congress expressly delegated authority to tribe in Clean Air Act). Furthermore, at least one U.S. District Court has noted that “the statutory language [of the Clean Water Act] seems to indicate plainly that Congress did intend to delegate . . . authority to tribes” State of Montana v. EPA, 941 F. Supp. 945, 951 (D. Mont. 1996). Therefore, the basis for KBIC's authority to regulate waters within its Reservation includes delegated authority from Congress in addition to its own inherent authority.

IV. KBIC Has Authority to Regulate Water Quality Under Tribal Law.

Having identified two alternative bases for KBIC's assertion of authority, we must also consider whether that authority is presently limited by the KBIC itself. See Cohen's Handbook of Federal Indian Law § 4.01[2][a], p. 214 n.70 (Neil Jessup Newton et al. eds., 2012) (“A tribal constitution will . . . limit the power of particular institutions of tribal government, until the constitution is properly amended or superceded”). Based upon our review of relevant Tribal documents, we can confirm that no such limitation exists with respect to KBIC. The KBIC Constitution provides the Tribal Council, the Tribe's governing body, with authority “to protect and preserve tribal property, wild life and natural resources of the Community, . . . to protect the health, security, and the general welfare of the Keweenaw Bay Indian Community.” KBIC Const. Art. IV, § 1 cl. a. Under the KBIC Constitution, the Tribal Council also has the authority “to promulgate and enforce ordinances which are intended to safeguard and promote the peace,

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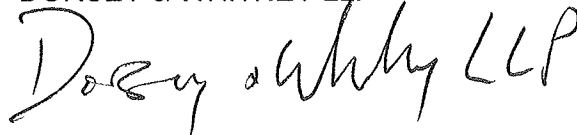
safety, morals, and general welfare of the Keweenaw Bay Indian Community by regulating the conduct of trade and the use and disposition of property upon the reservation, providing that any ordinance directly affecting non-members shall be subject to review by the Secretary of the Interior." KBIC Const. Art. VI § 1 cl. s. Therefore, the Tribal Council is fully vested with authority to promulgate regulations for on-Reservation surface water quality under KBIC law.

V. Conclusion.

KBIC has authority to regulate water quality within its Reservation and should be afforded TAS status by the EPA. The KBIC possesses inherent authority to regulate conduct on its own lands and to regulate the conduct of its own members. Furthermore, under Montana, Brendale, and the EPA's regulations, KBIC also has authority to regulate non-Indian and non-member activity on fee lands within the Reservation because such activity, if left unregulated, would have a serious and substantial effect on the health and welfare of KBIC and its members. The effect on KBIC and its members is particularly pronounced because KBIC and its members depend on fish, wild rice, and other plants and animals dependent on high-quality water and ecosystems for their economic, cultural, and religious well-being. Furthermore, even if KBIC did not have inherent authority to regulate water quality, Congress has delegated its authority to do so through the Clean Water Act. Finally, exercising such authority is consistent with KBIC Tribal law.

Respectfully submitted,

DORSEY & WHITNEY LLP



cc: Heather Chapman, Esq.
Micah Petosky